A **PORT VIEW SEAFOOD VILLAGE SDN BHD**

v.

ROCELYN TUBAL RANESES

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DAVID WONG DAK WAH J
[K11(A)-20-2010-II]
22 NOVEMBER 2010

C ***LABOUR LAW:*** *Wages - Service charge - Whether part of wages - Labour Ordinance (Sabah), s. 2*

WORDS & PHRASES: *'work done in respect of his contract of service' - Section 2 Labour Ordinance (Sabah) - Service charge - Whether within definition of wages under s. 2*

D

The appellant appealed against the decision of the labour court which allowed the respondent's claim against the appellant for the sum of RM4232.70. The respondent's claim was for overtime payments due, passport cancellation costs and other miscellaneous
E deductions. The main issue was whether the respondent's service charge payments were part of her wages as defined by s. 2 of the Labour Ordinance (Sabah) as the labour court had taken those payments into consideration when computing the ordinary rate of pay for the purpose of calculating the overtime payments due.

F

Held (dismissing appeal with costs):

(1) The pivotal words in s. 2(3) of the Labour Ordinance were "work done in respect of his contract of service". As long as
G payments were made because of that service, they fell within the definition of wages. In the present case, the "service charge" was payment made for "work done in respect of his contract of service" (Privy Council in *Peter Anthony Pereira & Anor v. Hotel Jayapuri Bhd & Anor*; (foll)). (para 13)

H **Case(s) referred to:**

Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran, Semenanjung Malaysia v. Hotel Equatorial (M) Sdn Bhd [2008] 3 ILR 590 ***(refd)***

Hotel Equatorial (M) Sdn Bhd v. Thomas George (Rayuan Sivil No R2-16-6-95) (Unreported) ***(refd)***

I *Peter Anthony Pereira & Anor v. Hotel Jayapuri Bhd & Anor [1987] 1 CLJ 14; [1987] CLJ (Rep) 12 PC* ***(foll)***

Legislation referred to:
Labour Ordinance (Sabah), s. 2(3)

For the appellant - Chin Teck Min; M/s Chin Jingulam & Assocs
For the respondent - P Joseph Perira TP Perira; M/s PJ Perira & Co

Reported by Usha Thiagarajah

JUDGMENT

David Wong Dak Wah J:

[1] This is an appeal by Port View Seafood Village Sdn Bhd (appellant) against the decision of the Labour Court (LC) dated 6 August 2010 where the LC, after hearing the claim by the respondent, made the following order:

FORM C

PERINTAH

(Di bawah Seksyen 7A, Ordinan Buruh Sabah)

Pengarah Tenaga Kerja Kes Saman No.
KBR JTK.H.KK.KBR/600-2/1/10/194

DI ANTARA

ROCELYN TUBAL RANESES Pengadu

DAN

PORT VIEW SEAFOOD VILLAGE SDN BHD Defendan

Bahawasanya aduan dalam kes no. JTK.H.KK.KBR 600-2/1/10/194 di atas telah didengar dan diuruskan di Pejabat Tenaga Kerja, Kota Kinabalu pada 06 haribulan Ogos 2010 Pengarah dengan ini membuat perintah berikut, bahawa:

Saya dengan ini perintah defendan PORT VIEW SEAFOOD VILLAGE SDN BHD membayar kepada ROCELYN TUBAL RANESES (Passport: XX2518181) dengan tuntutan pihak pengadu seperti di bawah:

1. Bayaran Balik Potongan Passport	:	RM1320.00
2. Bayaran Kerja Lebih Masa	:	RM2757.70
3. Bayaran Lain-Lain Potongan	:	RM 155.00
JUMLAH	:	RM4232.70

A Dan adalah di perintahkan lagi iaitu sebagai penalti bayaran lewat, faedah atas kadar 8% setahun hendaklah di kenakan ke atas semua bayaran tertunggak dan faedah itu dikira mulai 07.09.2010. Bayaran ke atas perintah ini hendaklah di buat dalam tempoh 30 hari dari tarikh perintah ini.

B Bertarikh pada 06 haribulan Ogos 2010

Adalah dengan ini disahkan bahawa jumlah wang sebanyak _____ bagi penyelesaian penuh/sebahagian daripada Perintah ini telah dibayar di pejabat ini.

C Bertarikh pada 06 haribulan Ogos 2010

HAJAH FARAH FADILAH BTE ABDULLAH
b.p PENGARAH TENAGA KERJA

D **[2]** In its memorandum of appeal dated 6 October 2010, the appellant had complained that the hearing by the LC was done in the absence of the appellant. And because of this absence, counsel for the appellant submits that the matter ought to be remitted back to LC for deliberation. The circumstance in which this contention is made is this. The notice hearing by the LC had
E stated that the hearing on 23 July 2010 was to be held at "jam 2.30 pagi". For completeness I attached the notice of hearing:

JADUAL KETIGA
[Kaedah 10]
F BORANG A
SAMAN DEFENDAN
[Perenggan 7F*(c)* Ordinan Buruh Sabah)

Kes Saman Pengarah Tenaga Kerja No.: KBR/600 2/1/10/194

G Antara

ROCELYN TUBAL RANESES ..... Pengadu

Dan

H PORTVIEW SEAFOOD VILLAGE ..... Defendan

Defendan yang dinamakan di atas PORTVIEW SEAFOOD VILLAGE yang bermastautin (atau mempunyai tempat perniagaannya atau bekerja) di LOT 18, GROUND FLOOR, TOURIST CULTURE ESPLANADE THE WATER FRONT,
I JALAN TUN FUAD, 88000, KOTA KINABALU, SABAH.

Kamu adalah disaman untuk hadir di Pejabat Tenaga Kerja Kota Kinabalu, Tingkat 2, Wisma PERKESO, No 11, Lorong Sempelang, Tanjung Aru, Kota Kinabalu, Sabah jam 02.30 pagi pada 23 haribulan Julai tahun 2010 untuk menjawab suatu aduan yang dibuat terhadap kamu oleh pengadu yang dinamakan di atas bahawa: (nyatakan butir-butir aduan)

i) Rocelyn :

1. Potongan Pasport	=	RM1,320.00
2. Kerja Lebih Masa	=	RM2,757.00
3. Potongan Lain	=	RM 155.00
JUMLAH	=	RM4232.70

Sila ambil perhatian bahawa kamu boleh membawa ke pendengaran aduan di atas, mana-mana saksi yang kamu ingin panggil bagi pihak kamu dan bahawa kamu boleh memohon kepada Pengarah bagi saman kepada mana-mana orang untuk hadir dan memberi keterangan.

Dalam kemungkinan kehadiran kamu, aduan itu boleh didengar dan diputuskan dalam ketidakhadiran kamu; dan kamu akan terikat dengan keputusan itu dan keputusan itu boleh dikuatkuasakan terhadap kamu menurut perenggan 7F*(h)* dan *(i)* Ordinan.

Jika kamu tidak mematuhi saman ini sebagaimana yang diperuntukkan di bawah seksyen 70, menurut seksyen 130B Ordinan, kamu boleh didakwa bagi suatu kesalahan di bawah Bab X Kanun Keseksaan dan boleh dihukum di bawahnya.

Bertarikh pada 01 haribulan Julai 2010

...

Pengarah Tenaga Kerja

[3] Relying on that notice, the appellant through their representatives turned up at the LC at the early hour of 2am and when they were refused entry they lodged a police report. With respect to the appellant, I am not sure what they were trying to prove by turning up at LC at 2am. Any reasonable person would have contacted the LC to reconfirm the time for the hearing of the matter. In my view by turning up at the early hours, the appellant was bordering contempt of the LC. The LC is an important institution set up by the government to determine

disputes between employer and employee expeditiously which they have done in this case. Hence they should be respected like any tribunal set out by the government.

[4] Counsel for the respondent however informs the court that the respondent's visa expires on the 4 November 2010 and has to return back to the Philippines before or on that day. Any remission back to the LC would give the respondent unnecessary financial burden which could make her claim of RM4,232.70 pale in significance. Counsel also submits that in this appeal, the court can only deal with issue of law and not of facts which the LC had already deliberated on.

[5] After consideration of the respective submissions, I find that it would not in the interests of justice to remit the matter back to the LC as since the first hearing of this matter on 28 October 2010, counsel for both sides have been able to tender the grounds of decision of the LC and the manner in which the sum RM4,232.70 was calculated. In another word, I have all the relevant materials before me to allow me to make an informed decision. Furthermore the issue which needs to be considered by me is a legal issue and it is this:

Whether The Service Point Of RM500 Should Be Taken Into Account When Computing The Ordinary Rate Of Pay (ORP) For The Purpose Of Calculating Overtime Pay?

[6] The LC calculation as shown in enclosure 16 is this:

ORP - Basic (RM300) + Service Point (RM500)/26/8 x 1.5	=	RM5.769
Number of overtime hours – 239 x 2 hrs	=	478 Hours
Overtime payment due – RM5.769 x 478 Hrs	=	RM2757.85

[7] Counsel for the appellant did not object to the formula applied by the LC but objects to the use of service point amount of RM500 as part of wages in its calculation for the ORP. According to counsel for the appellant, service point payments as set out in the employment agreement between the appellant and respondent do not come within the definition of wages set out in s. 2(3) Labour Ordinance which states as follows:

"wages" means basic wages and all other payments in cash payable to an employee for work done in respect of his contract of service but does not include:

(a) the value of any house accommodation or the supply of any food, fuel, light or water or medical attendance, or of any approved amenity or approved service;

(b) any contribution paid by the employer on his own account to any pension fund, provident fund, superannuation scheme, retrenchment, termination, lay-off or retirement scheme, thrift scheme or any other fund or scheme established for the benefit or welfare of the employee;

(c) any travelling allowance or the value of any travelling concession;

(d) any sum payable to the employee to defray special expenses entailed on him by the nature of his employment;

(e) any gratuity payable on discharge or retirement; or

(f) any annual bonus or any part of any annual bonus;

[8] Counsel for the appellant submits that service point payment cannot be regarded as part of wages as they are money paid by the customers and they are not subject to payment of EPF. In rebuttal counsel for the respondent relies on the wordings employed in defining the word 'wages'. The operative words according to counsel are 'work done in respect of his contract of service' and as long as payments to the respondent related to her work, those payments are part of the wages. In this case, he submits that since payment of service point relates directly to her work done in respect of her contract of service, those payments come within the definition of the word 'wages'.

[9] A similar issue arose before the Industrial court in the case of *Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran, Semenanjung Malaysia v. Hotel Equatorial (M) Sdn Bhd* [2008] 3 ILR 590 where the learned Chairman Amelia Tee Hong Geok Abdullah (as she was then was, now a Judicial Commissioner) set out in detail the development of the law on this particular issue. The facts there in brief are these. The dispute between the union and the hotel is in respect of art 11 of the Collective Agreement Cognizance No. 52/2003 ('CA'). The hotel contended that in

computing the ordinary rate of pay ('ORP') for the purposes of computing pay for overtime and work done on public holidays and rest days, the service charge in respect of such payment should be paid from the service charge pool collected by the hotel on behalf of the employees within the scope of the CA. The union however contended that the payment of the ORP for overtime, public holidays and rest days should be made from the hotels own fund. The conflicting contentions gave rise to two issues. Firstly was whether the service charge should be taken into consideration when computing the ORP for the purposes of calculating overtime pay and pay on rest days and public holidays and secondly, if the answer to the first issue is answered in the affirmative, whether the service charge element in the overtime pay and pay for rest days and public holidays should be taken from the service charge pool collected by the hotel or from the hotel's own fund.

[10] The Industrial Court by a majority decision found in the affirmative to both issues and I now examine the grounds for their decision which can be found at pp. 601-603 where the learned Chairman referred to the case of *Hotel Equatorial (M) Sdn Bhd v. Thomas George* (Rayuan Sivil No R2-16-6-95):

> As this court has stated in the case of *Bukit Jambul Hotel Development Sdn. Bhd. v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar Dan Restoran, Semenanjung Malaysia* [2005] 2 ILR 927 (Award No. 1247 of 2005), prior to the Court of Appeal case of *Hotel Equatorial (M) Sdn. Bhd. v. Thomas George a/l M.J. George* (Rayuan Sivil No. R2-16-6-95) service charge was treated as a part of wages. As such, the history of the case of *Hotel Equatorial (M) Sdn. Bhd. v. Thomas George (supra)* is relevant and would need to be recounted here.
>
> [31] The dispute initially started in the Labour Court over what should be the mode of calculation for payment in respect of work done on a public holiday. The claimant's contention was that in addition to his basic wage, he was paid a service charge, food allowance and shift allowance and all these payments fell within the definition of wages in s. 2 of the Employment Act 1955. As such, he contends that they should be included in the computation of Ordinary Rate of Pay (ORP) to determine the amount that he should receive for work that was done on a public holiday.
>
> [32] The respondent's contention, on the other hand, was that service charge, food allowance and shift allowance did not come within the definition of 'wages' and therefore they should be excluded from the computation of ORP.

[33] In coming to a decision, the Director of Labour took the view that the word 'wages' was to be given a wider meaning. He relied on the decision of Wan Hamzah SCJ in the Supreme Court case of *Lee Fatt Seng v. Harper Gilfillan* [1980] Sdn. Bhd. [1988] 1 CLJ 270; [1988] 1 CLJ (Rep) 156 where His Lordship held as follows:

> … It seems that the words "work done" in the definition of "wages" are used so as to stress on the requirement that the remuneration must be for work done in respect of the contract of service of the employee concerned, so that any payment made to him by the employer *ex-gratia*, not for work done or to be done, and not in connection with the contract of service, is not part of the wages.

[34] The Director of Labour thus concluded that service charge, food allowance and shift allowance, not being *ex gratia* payments, not being payment made in connection with the contract of service and expressly excluded from the definition of wages in s. 2 of the Employment Act 1955, would come within the definition of "wages" and should thus be included together with basic wage in computing ORP to determine the public holiday payment due to the claimant.

[35] The respondent took the case up on appeal to the High Court (Rayuan Sivil No. R2-16-6-95). There, his Lordship Dato' Azmel bin Haji Maamaor, in dismissing the appeal, held as follows:

> 5. Dalam penghakimannya, Pengarah Buruh membuat keputusan sedemikian setelah mendapati bayaran caj perkhidmatan, bayaran elaun makan dan bayaran elaun shif tersebut suatu bayaran bagi kerja yang telah dilakukan (work done) oleh Responden berdasarkan atas fakta bahawa bayaran-bayaran ini adalah bayaran-bayaran kontraktual yang diterima oleh Responden bagi perkhidmatan yang diberi sebagaimana diperuntukkan oleh Perjanjian Bersama yang merupakan sebahagian kontrak perkhidmatan Responden dengan Perayu. Ini bermakna, Pengarah Buruh menolak hujah peguam Perayu bahawa bayaran-bayaran tersebut adalah "*ex gratia* payments".
>
> 6. Saya memutuskan untuk bersetuju sepenuhnya dengan keputusan Pengarah Buruh ... .

[36] The appellants, being dissatisfied with the decision of the High Court as outlined above, appealed to the Court of Appeal. The Court of Appeal in Case W-04-24-94 upheld the decision of the High Court and dismissed the appeal with costs.

A [37] As such and in line with the above recounting, it is clear and undisputed that service charge is part of wages. Unlike the Employees' Provident Fund (Amendment) Act 1986 (A642) which excludes service charge from the definition of wages under the Employees' Provident Fund Act 1951, no similar amendment was ever made to the definition of wages under the Employment Act, 1955. The only conclusion to be drawn from this is that it was never the intention of the legislature to exclude service charge from the definition of wages under the Employment Act, 1955.

[11] The learned Chairman had referred to the EPF Act as the C Hotel had relied on the case of *Peter Anthony Pereira & Anor v. Hotel Jayapuri Bhd & Anor* [1987] 1 CLJ 14; [1987] CLJ (Rep) 12 and the subsequent amendment of Employees' Provident Fund (Amendment) Act 1986 (A642). In that case the Privy Council had to determine whether services charge is within the definition D of wages in the EPF Act. Wages' is defined there as follows:

> the remuneration in money due to an employee under his contract of service or apprentice ship, whether agreed to be paid monthly, weekly, daily or otherwise:

E **[12]** The trial court and the Federal Court had concluded that service charge was not part of wages and their reason is that service charge is money collected from the customers for distribution to the employees under a point system and as such that money was never part of the employer's money but money F paid by the customers for the employees and passed to them through the employer. That reason was rejected by the Privy Council and this is how their Lordship puts it:

> Even if this be a correct analysis of the position, it is plain that G Mr. Pereira's entitlement to his share of the service charges collected by the hotel company arises under his contract of service with the hotel company and therefore, even if the hotel company in terms of that contract is acting as his agent to collect for him and the other employees from the hotel's customers, the service charges which they pay to the hotel company, that money H is due to them by the hotel company under their contracts of service as a reward for the service which the employees render under their contracts of service to the hotel company itself. Accordingly, the share of service charge is properly to be regarded as due to Mr. Pereira under his contract of service as remuneration and for the reasons already given it is in respect of I the normal periods of work. That money, once in the hands of

> the hotel company, is due by them as employer to Mr. Pereira in terms of his contract of employment and the provisions of the Act entitling the employer to relief from the employee for the employee's share of the contribution under the Act, entitles the hotel company to deduct that contribution, not only from the basic salary, but also from the money due under his contract to Mr. Pereira in respect of his share of the collected service charges. Their Lordships are therefore of the view that the reasoning of both the Federal Court and the learned Judge, with great respect, does not negative the conclusion which has been already stated.

[13] Reverting to the issue at hand and applying the established principle of constructing legislation of giving the words their natural meaning and bearing in mind that there was no amendment to the Employment Act after the *Pereira* case, I concur with the interpretation given by the learned Chairman. The pivotal words in my view are 'work done in respect of his contract of service' and as long payments are made because of that service, it is caught by the definition of wages. In this case there cannot be any denial that the 'service charge' is payment made for 'work done in respect of his contract of service'. My view is of course fortified by the decision of the Privy Council.

[14] For reasons given above the appeal is hereby dismissed with costs of RM1,000 and I order that the appellant pay the sum of RM4,232.70 to the respondent or her solicitors within seven days from today.